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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-1429

MARINA B. SIMES and VALERIE S. PARKER,
Petitioners,

vs.

ROBERT C. HAASE, JR., Esq., MARIA ELENA HAASE; HARBOR SAVINGS & LOAN ASSOCIATION (USLIFE SAVINGS), a California corporation, *et al.*,
Respondents.

PETITIONERS' REPLY BRIEF.

1. Respondents' brief in opposition suggests that the lender respondent Harbor had accepted Petitioners' *partial* payment in cure of the default, whereas the record shows that respondent Harbor accepted, unqualifiedly endorsed, and cashed Petitioners' cashier's check in *full* payment of Harbor's complete demand in cure of the default—and this payment included Harbor's 3% renewal fee bonus for a two-year extension of its land loan to the maturity date of August 19, 1968 [C.T. 60, 161, 256]. Petitioners' original complaint was filed August 9, 1971, less than three years later [C.T. 1].

2. Respondents' brief further implies that the constitutional question presented in Petitioners' petition cannot be asserted in this Court because it was not

raised in the state court action. However, 28 United States Code § 1257 specifically provides, in pertinent part:

> "(3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States."
>
> *Rohr Corp. v. San Diego County,* 362 U.S. 628 at 630 (1960).

Appellants' Petition for Hearing in the California Supreme Court invoked protection of the U.S. Constitution under Section 1 of the Fourteenth Amendment, for this purpose, by the following:

> "Said decision (in the Court of Appeal) further deprives Appellants of their property without due process of law and without a hearing by the Court (on the merits)." (See p. 5 of Petition for Hearing in Supreme Court of Calif.)

3. Respondents further maintain "Petitioners have cited no authorities suggesting that the California court's dismissal was improper." Petitioners contend that the following authorities are supportive of Petitioners' action for recovery of property wherein acceptance of tender waived lender's right to accelerate and call for the entire amount of the loan not yet due, by notice of default and election to sell, without prior notice, and then attempt to return Petitioners' payment as insufficient after having represented it was sufficient, because lender had a change of mind.

Rogers, et ux. v. Piland, 100 S.E. 181 (1919) Supreme Court of North Carolina;

Bisno v. Sax, 175 Cal.App.2d 714 (1959) Calif.;

Lichty v. Whitney, 80 Cal.App.2d 696 (1947) Calif.;

Lopez v. Bell, 207 Cal.App.2d 394 (1962) Calif.;

Tomczak v. Ortega, 240 Cal.App.2d 902 (1966) Calif. (App. Op. Brief, p. 12);

Section 1501, Civil Code of California;

Section 1504, Civil Code of California;

Section 738, Code of Civil Procedure of California;

Section 318, Code of Civil Procedure of California (Pet. for Writ, pp. 3-4).

Moreover, the Supreme Court of Texas held in *Slaughter v. Qualls*, 162 S.W.2d 671 (1942) [C.T. 109-110 and 118-121] (pp. 9-10 of Pet. for Writ) that:

> "Where mortgagor was not in default in his payments of principal or interest on notes secured by deed of trust . . . foreclosure sale and trustee's deed were 'void,' and mortgagor could prove invalidity of sale in a straight suit to recover the land, and hence his action to quiet title which was instituted more than four years after execution of the trustee's deed, and wherein he attacked the validity of the trustee's deed, was not barred by limitations." [C.T. 119, see Note 9, Limitation of Actions, 162 S.W.2d 672] (See App. Reply Brief, pp. 11-12).

4. On the other hand the case, *Leeper v. Beltrami*, 53 Cal.2d 195 (1959), relied on primarily by respondents and cited by the Court of Appeal, relates to an action to rescind a contract on the ground of duress and voidability. It was not an action to recover real property based on a void act as at bench. However, it

appears that the California Supreme Court has ruled that this case in contract rescission to cancel a deed, grounded on duress, is applicable to subject action in tender and its acceptance which created a void act upon respondent-lender's disaffirmance.

It is, therefore, vitally important that the so-called *Leeper* doctrine, and the interpretation of its applicability, as a test case of first impression, when compared to the aforesaid ruling of the Texas Supreme Court in the case of *Slaughter v. Qualls,* 162 S.W.2d 671 (1942), be reviewed by this Court in the interests of protecting the multitude of all persons dealing in trust deeds and mortgages and financing charges involved therein.

The applicability of the law in the foregoing *Slaughter* case, while recognized in other states and nationally, apparently has been disregarded by the Court of Appeal and the California Supreme Court. It is therefore submitted for settlement by the United States Supreme Court as an important and substantial question of law, affecting trustors' rights nationwide in their dealings in the purchase of real property subject to financing charges under mortgages and deeds of trust.

5. In response to the Court of Appeal's opinion as to delay in filing this action, it is submitted that laches does not apply where the land is raw, vacant and unimproved as in the instant case (Pet. for Hearing, p. 21).

Conclusion.

In summarizing the instant action, Petitioners respectfully submit that:

1. By unconditional acceptance and cashing of Plaintiffs' tender before electing to accelerate the debt, defendant lender Harbor waived its right to accelerate

the debt by recording its Notice of Default and Election to Sell and the foreclosure sale thereafter is void.

2. That the five-year statute of limitations pursuant to Code of Civil Procedure Section 318 is applicable to an action to quiet title for recovery of real property, involving a void sale, where Plaintiffs were seized of title and possession of the property within five years of filing of said action.

3. That by respondent Harbor's acceptance of said tender, which included a 3% land loan renewal fee extending the maturity date of the loan to August 19, 1968, Petitioners had timely filed their action within three years of maturity of said loan and thus were not barred by the four-year statute of limitations as so ruled.

For the foregoing reasons, along with those set forth in the Petition for Writ, it is respectfully submitted that the Petition for Writ of Certiorari to the California Supreme Court should be granted.

Upon the Court's granting of said Petition, Petitioners will substitute duly qualified counsel to execute the Appearance Form to appear at the hearing on the matter before this Court.

Respectfully submitted,

MARINA B. SIMES and
VALERIE S. PARKER,
Petitioners in Propria Persona.